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2. An officer is bound to use all reasonable and proper personal exertions to secure a person for whose arrest he has a writ; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time. *Id.*

3. An officer effects an arrest by laying his hand upon a person whom he has authority to arrest, for the purpose of arresting him although he may not succeed in stopping or holding him. *Id.*

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II. *Actual Possession of Warrant, necessary.*

1. A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C. to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:

Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time. *Galliard* vs. *Laxton*, ... 305

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1. A collusive settlement of an action, by the parties, to deprive an attorney of his costs, made after a notice from the attorney, of his claim, to the defendant, will not be allowed to prejudice the attorney's right to enforce payment of his taxable costs. *Carpenter* vs. *The Sixth Avenue Railroad Company*, ... 410

2. His claim for taxable costs will be protected against a collusive settlement in an action upon a *tort* merely *personal*, as well as in an action upon contract; and as well against a settlement made before trial as after judgment. *Id.*

3. But an attorney, by an agreement between him and his client, that, besides taxable costs, he shall receive as a compensation for his services a sum equal to one-third of the sum recovered, will not acquire any right in the *subject-matter* of such an action, or control over it, which will affect the power of the plaintiff to settle and release the *claim for damages* before a trial has been had. *Id.*

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BILLS AND NOTES.

I. *Remitted for collection, and credited as cash, when held for value.*

M., C. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other

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for collection, and knew that each remitted paper for collection belonging to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *futuro* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill be longed to M., C. & M., but on demand thereof refused to surrender it.
Held, That the plaintiffs could not retain the bill as against *M., C. & M.*, as indemnity against the balance owing to them by *J. L. & Co.*, and that they were not *bonâ fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M. *Hoffman* vs. *Miller*, 676
2. *Held*, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration. *Id.*

II. *Fraudulently negotiated—Bonâ fide Holder—Antecedent Debt, when good Consideration.*

Where L. executed and delivered to H. four blank promissory notes, and authorized him to fill the blanks with sums not exceeding $5000 each, for the purpose of negotiating them for the benefit of L.; and H. delivered to L. similar notes, to serve as receipts, or to indemnify him in case he (H.) should misuse any of the funds arising from the negotiation of L.'s notes; and H. returned the notes executed by L. to him with the blanks unfilled; and one of the notes executed by H. was filled by L. with the sum of $8629.81, and passed to the plaintiffs by indorsement as collateral security for an antecedent debt, *it was held*, that the court did not err in instructing the jury:
1. That the *onus* of showing the consideration of the note was upon the maker, the presumption being that it was sufficient.
2. That if the indorsees were *bonâ fide* holders for a good consideration, it could make no difference that it was executed in blank, or that it was accommodation paper which had been misused by the indorser.
3. That if the transaction was an exchange of notes, the indorsee could not be defeated by showing that, subsequent to the transfer, H. had delivered up and cancelled the notes of the indorser.
4. That if H.'s notes were delivered merely to stand as receipts to protect L. in case H. should misuse the funds arising from the notes given to him to negotiate, any note filled up by L. (his notes having been returned to him) would in his hands be without consideration.
5. That the presumption was that the indorsee took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under

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suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties; that the defendant was not bound to prove that the plaintiff purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril.

6. That though the plaintiffs took the note as collateral security for an antecedent debt, they are nevertheless *primâ facie*, though not *conclusively*, to be considered as holders for value, and it is on the defendant to show that they are not such holders; that if it was taken for collateral security only, the plaintiffs parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration or in consequence of receiving it, they would not be such holders. *Trustees of Iowa College* vs. *Hill*, ... 745

III. *Where Demand to be made, on change of Residence of Maker.*

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the indorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the indorser, to present the note for payment at the maker's former place of residence in New York. *Foster* vs. *Julien*, . . 363

2. The cases of Anderson *vs.* Drake, 14 Johnson 114, and Taylor *vs.* Snyder, 3 Denio 145, commented upon, and the case of Wheeler *vs.* Field, 6 Metcalf, 290 overruled. *Id.*

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II. *Domicil, effect of, on Testamentary Acts.*

1. In executing a will of personal property, the testator must observe the formalities required by the law of his domicil, and not those of the place where the will is made. The maxim "locus regit actum" has no place in English or American testamentary jurisprudence. This principle is universally true when the domicil continues to the time of the testator's death. *Mcultrie et al.* vs. *Hunt*, ... 148

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2. If the testator, after executing the will, changes his domicil and resides under another jurisdiction at his death, the formalities required by the new domicil must have been observed, or the will is void. *Id.*

3. A will is an inchoate and provisional transaction until the testator's death, and the law may require, after its execution, new formalities to be complied with. These, as well as other formalities, must have been observed by all testators domiciled in the jurisdiction at the time of their death, without reference to their domicil when the will was executed. *Id.*

4. In order that the principles of "comity" may be invoked in favor of the wills of testators domiciled elsewhere, they must have resided in another State at the time of their death. The will is then enforced in accordance with the rules of international law applicable to the subject. *Id.*

5. An act done in another State, in order to create rights which our Courts ought to enforce on the ground of comity, must be of such a character, that if done in this State in conformity with its laws, it could not be constitutionally impaired by subsequent legislation. Per DENIO, J. *Id.*

6. H., the alleged testator, made his will of personal estate in South Carolina, where he then resided. He did not, when it was executed, declare to the subscribing witnesses that it was his last will and testament. This declaration was not necessary by the law of that State, and it was conceded that the will was at the time properly executed for South Carolina purposes. After making his will he removed to New York, where he resided at the time of his death. In this State such a declaration is necessary. He died without republishing his will. *Held*, that the will was void, and that H. died intestate. *Id.*

7. The law of the continent of Europe is not to be resorted to in determining a question of this kind, until the sources of instruction, furnished by the Courts and jurists of England and of this country, have been exhausted. *Id.*

III. *Domicil, how far it governs Succession.*

1. The inheritance, whether testamentary or from intestacy of a foreigner, and especially of an American of the United States, not domiciled in France, must be regulated as to personal property existing in France, without excepting the loans of the State by the law of the country where the foreigner's domicil was, and where, consequently, his inheritance was unobstructed. *Succession of Gouriè*, ... 424

2. This rule, founded upon the maxim *mobilia sequuntur personam*, has no exception, except where Frenchmen interested as heirs in the inheritance of a foreigner, have to defend themselves as to property existing in France against dispositions or statutes contrary to some one of the essential and fundamental rights rendered sacred by French legislation, such as the legal reservation, the prohibition of substitutions, &c.; in which case the right of deduction created by Article 2, of the law of July 14th, 1819, is open to them. *Id.*

3. ESPECIALLY: The widow of a citizen of the state of Pennsylvania, married agreeably to the law of that State, which is also that of the inheritance, and endowed by virtue of its matrimonial law, with one-half of all the personal property of her husband, has a right to demand in France in opposition to a French universal legatee, the transfer, by virtue of this title, of the one-half of a *rente* inscribed upon the great book of the public debt. (Treaty of Reciprocity between France and the United States of September 15th, 1853.) *Id.*

IV. *Validity of blank transfer of Stock, governed by Law of State where to take effect.*

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CONSTITUTIONAL LAW.

I *Laws legitimating Bastards.*

1. An estate already descended cannot be divested from the legal heirs, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance. *Killam* vs. *Killam*, . . 18

2. By an act of the Legislature, passed in 1853, it was provided that George *W.* K., son, and Emily M., daughter of *George* K., shall have and enjoy all the rights and privileges, benefits and advantages, of children born in lawful wedlock, and shall be able to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock." The persons named were, in point of fact, children of George K., by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for *all* purposes of inheritance, the defect of blood of the children, as though at the time of their birth their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land. *Id.*

3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely. *Id.*

4. *Held*, further, that the fact that the conveyance of the land in question to George *W.* K., by his father, was expressed to be in consideration of natural love and affection, was not material. *Id.*

II *Legal tender Notes.*

1. Defendants executed a bond with warrant of attorney, for $28,000, payable "in specie, current gold and silver money of the United States," and "that no existing law or laws, and no law or laws which may be hereafter enacted, shall operate, or be construed as operating to allow payment to be made in any other money, than that above designated;" "the said obligors expressly waiving the benefit derived or to be derived from such law or laws."

Judgment was entered and fi. fa. issued, in which the sheriff was required to levy the debt and interest "in specie, current gold and silver money." The Court, on motion, set aside the fi. fa., and *held:* That the fi. fa. was irregular; as a *final judgment* is necessarily for *lawful* money, and is payable in any money which the law has made a legal tender. *Shoenberger* vs. *Watts*, ... 553

2. By the charter of the Bank of the State of Indiana, it was provided, that the bank should not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, &c., and that if it should neglect or refuse to do so, then the holder should be entitled to recover the amount with twelve per cent. interest. On the 1st of April 1862, the plaintiff demanded of a branch bank payment of its notes in coin, which was refused, but the amount tendered in United States legal tender Treasury Notes.

Held, (1st,) That the provision in the charter in question, did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such.

(2d), That Congress had *not* the Constitutional power to declare paper money a legal tender; but

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(3d), That, considering that the Legislature and Executive Departments of the Federal Government had decided in favor of the existence of such a power, and what the consequences of an opposite decision at the present time by the court would be, they would hold the Treasury Notes to be a legal tender until the Federal Courts should determine otherwise. *Reynolds* vs. *Bank of the State of Indiana*, . . . 669

III. *Liability of U. S. loans to State taxation.*

1. Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State *The People* vs. *The Commissioners of Taxes*, ... 81

2. The taxation, by the State, of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States, where no unfriendly discrimination to the United States, as borrowers, is applied by the State law, and property in its stock is subjected to no greater burdens than property in general. *Id.*

3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *quære*. *Id.*

4. The cases of *McCullough* vs. *Maryland*, 4 Wheat. 116; *Osborn* vs. *U. S. Bank*, 9 Wheat. 738; and *Weston* vs. *The City of Charleston*, 2 Pet., examined and distinguished. *Id.*

IV. *Stay Law, validity of.*

The Indiana statute of 1861, which provides that in all cases of sales by the Sheriff on execution, after its passage, the Sheriff shall not give the purchaser a deed for, and possession of the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed in the manner therein provided, is unconstitutional, so far as it applies to sales on judgments upon contracts existing at, and before its passage. *Scoby* vs. *Gibson*, . . . 221

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I. *When varied by subsequent Parol Agreement, or by Custom.*

1. Where a contract is made by written correspondence solely, it must be treated as a contract in writing, not subject to addition or alteration by proof of the acts, declarations, and intentions of the parties aliunde. *Whitmore* vs. *South Boston Iron Company*, ... 408

2. But it is competent to show that the parties subsequent to entering into the same, consented to waive any of its provisions, and to substitute others in their stead. *Id.*

3. But an additional warranty, not expressed, or implied by its terms, that the article sold is fit for a particular use, cannot be added, either by implication of law or parol proof. *Id.*

4. Nor can the question whether such warranty is fairly to be inferred from the application of the terms of the written contract to its subject-matter, or from the attending circumstances, be submitted to the jury: they should be instructed that no such warranty exists in the case. *Ia.*

5. A contract to manufacture "retorts like the one before furnished" imports more than likeness in "size, shape, and exterior form." It has reference to the material and workmanship. *Id.*

6. Such a contract cannot be controlled by proving a custom in the vicinity of the transaction, that founders shall not be held to warrant

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their manufacture, unless by express contract; or, in case of apparent defects, and the absence of any express agreement, that they shall have their castings returned in a reasonable time, and the right to replace them by new ones. *Id.*

7. The rule of damages for not furnishing manufactured articles according to contract, is the difference in value between those actually furnished and such as should have been, unless they were to have been furnished for a particular use. *Id.*

II. *When void as against Public Policy.*

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CORPORATION.

I. *Stock, how to be transferred.*

1. Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership. *Pinkerton* vs. *Manchester and Lawrence Railroad*, . . . 96

2. Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in this State, and by proper certifying officers resident therein. *Id.*

3. On the transfer of stock the delivery will not be complete, until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained, conclusive evidence of a secret trust, and therefore as matter of law fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring State, proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor. *Id.*

4. But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in this State: *It was held*, that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid. *Id.*

5. Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial or at any intermediate period. *Id.*

II. *Fraudulent issue of Stock.*

R. & G. L. Schuyler being the owners of one hundred and sixty shares in the defendants' company, of which R. Schuyler was the Register and Transfer Agent, the latter in 1849 delivered to the plaintiffs, as collateral security for a debt due by him, certificates for ninety of those shares, with a blank power. No application for a transfer on the books of the company, as required by the charter, was made until 1854, when it was discovered that R. S. had been guilty of a fraudulent over issue of the stock of the company to his firm, but there was no evidence that any of this spurious stock had passed out of the hands of the firm before the deli-

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very of the genuine certificates to the plaintiffs. The company subsequently refused to allow the transfer of the latter. *Held*,

1. *Burden of proof.*—It is incumbent upon the defendants to show, if such be the fact, that these certificates do not represent the genuine stock of the company, that being a fact more exclusively in their power to prove.

2. *Plaintiffs' title.*—The plaintiffs are to be regarded as the first and only equitable purchasers and owners of ninety of the one hundred and sixty shares of genuine stock held by Schuyler.

3. *Plaintiffs' title not lost by delay.*—The *bona fide* holders of such certificates had a right to rely upon them, as securing to the owners the shares which they represented, against all transfer to other parties.

4. *Notice to the Company.*—The *knowledge* of Schuyler that these certificates were held by *bona fide* purchasers, for value, was notice to the Company, while he acted as their transfer agent in registering the transfers to subsequent parties, and thus affected them, constructively, with the fraud of their agent, and thereby avoided the effect of such transfers as between the plaintiffs and the Company, and rendered them liable to make good the plaintiffs' loss thereby sustained.

5. *Semble.*—It is by no means certain that the transfers registered are to be regarded as having operated upon the plaintiffs' shares.

6. *Blank transfers.*—Blank powers of attorney, for transferring stock, although under seal, may be filled up at the convenience of the transferee, and thus operate as of their date.

7. *Lex loci.*—Such being the settled law of the State of New York where this instrument was intended to take effect, will remove all question as to its validity, even if we admit that the law of the place where it was executed is otherwise. *Bridgeport Bank* vs. *The New York and New Haven Railroad*, ... 210

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The Intestate law of Pennsylvania of 1833 provides that on the death of a person without issue, his parents shall take his real estate during their joint lives and the life of the survivor of them. A private statute of that state passed in 1853 enacted that A. and B. children of C. should have all the privileges, &c., of children born in lawful wedlock, and inherit and transmit real estate as such. These were the offspring of C. and of X., who had afterwards married Y. A. died intestate without issue, in 1859, at which time C., X., and Y. were all living. *Held*, that C. and X., as the legislative parents of A., took a joint life estate in his lands. *Killam* vs. *Killam*, ... 18

Held, also, that the act of 1855, which provides that the estate of a bastard shall, on his intestacy without issue, pass to his mother absolutely, did not apply. *Id.*

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I. *Right of Tenant to disprove Seisin in Husband.*

1. A tenant in an action of dower is not estopped from showing that the seisin of the husband was not such as to give his wife a right of dower, where he or his grantor has accepted a deed of the premises from the husband and claims under it, although he may be estopped from denying the right of the husband to give the deed. *Foster* vs. *Dwinel*, . 604

2. Estoppels are mutual. The wife is not estopped if the husband, in a deed, misstates his title—as one not giving dower. *Id.*

3. Dower is no part of the estate of the husband, but an independent and inchoate right, which may become an interest in the estate after his death, if his seisin was such as to give it. But the law will not create this estate by the operation of an estoppel where it otherwise would not exist, where the tenant has simply accepted a deed from the husband, which does not allude to the matter of dower, or to the existence of the wife. *Id.*

4. Where it appears in the deed from the husband, that his title is only that of mortgagee before foreclosure, no estoppel can arise. *Id.*

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Antecedent Debt, where constitutes a Purchaser for Value.

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange. *Le Breton* vs. *Peirce*, ... 35

HABEAS CORPUS.

Commitment for Contempt, when examinable upon.

See WITNESS.

HUSBAND AND WIFE.

See DOWER.
MARRIED WOMAN'S ACT.

INJUNCTION.

Against Violation of a Building Restriction.

H., being the owner of two city lots, one a corner property, and the other adjoining it, granted and conveyed the corner lot to D. and R. in fee; reserving a perpetual ground-rent, upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than *ten* feet. H., at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances, all made subject to the condition, the corner property became vested in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of *eleven* feet, expressly stipulating that such permission should not prejudice or impair the condition. H. died seised of the adjoining property, and also of the rent reserved out of the corner lot. His testamentary trustee granted and conveyed the adjoining property to C., no mention being made in the deed of the restriction imposed on the corner property. M. subsequently, by sundry mesne conveyances, became the owner of the rent reserved, which thus merged; and M. threatened to build in entire disregard of the restriction. C. filed a bill in equity to restrain him, and applied for a special injunction, which was refused; and M. went on and erected a three story back building. *Held*, upon appeal from the decree of the court below, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party, for whose benefit it appeared to be intended.

2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H., the original grantor, his heirs and assigns; nor for the benefit of the ground-rent; but that it was for the benefit of the adjoining property then owned by H.; and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right.

3. That a general plan of lots need not be shown; such a plan is only one means of proof of the existence of the right and duty; and this may appear as well from a plan of two lots, as of any greater number.

4. That the release of a part of a condition operates as a release of the whole, only where forfeiture of the estate for a breach of the condition is demanded; equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.

5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill *Clark* vs. *Martin*, ... 479

INSURANCE.

I *Authority of Officers of Insurance Company to bind by Guaranty of another Company.*

1. Though by the Charter of an Insurance Company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the President, or, in his absence or inability to serve, by the Vice-President or other officer, &c., and duly attested by the Secretary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the President, Secretary, or other

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general agent of the company, may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed: GRIER, J. *Constant* vs. *The Allegheny Insurance Company*, ... 116

2. But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced. *Id.*

3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a *good reputation* for "*settling losses*," and added, "*I don't know whether it is your custom to guarantee the offices you insure in*, or not; if *you do*, I may prevail on" the plaintiff "to hold the policies." The Secretary of the defendants, in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured *in offices satisfactory* to him, we will have them *cancelled*; but, *though they are not re-insurances*, yet in case of loss we will *feel ourselves bound for a satisfactory adjustment*. We deem the companies good, and *if any parties can settle with them, we can*. On the faith of this letter the plaintiff closed the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the Secretary of the defendants had no general authority to bind them by a guaranty of the solvency of the substituted companies; and, (2,) if he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers. *Id.*

II. *Conditions in Policy restricting Right of Action, when void.*

An agreement in a policy of insurance, executed by a foreign insurance company, that the insured waives the right to bring an action upon the policy except in the courts of the state incorporating such company, is void, both as against public policy and the statute of this state relating to foreign insurance companies of December 8, 1855; R. C., p. 884. *Reichard* vs. *The Manhattan Life Insurance Company*, . . . 547

III. *Representations, on Life Policy.*

Where, in a policy of insurance upon life, the representation was made that the insured was sober and temperate and in good health; if the representation was true at the time it was made, the subsequent habits of the insured would be no bar to a recovery upon the policy. *Reichard* vs. *The Manhattan Life Insurance Company*, ... 547

IV. *Abandonment of Voyage, on Marine Policy.*

1. An abandonment of the voyage insured and substitution of a new voyage defeats the policy of insurance from the time of such abandonment, although when the loss occurs the vessel is sailing in a track or course of the voyage common both to the voyage described in the policy, and in the substituted voyage. *Merrill* vs. *Boylston Fire and Marine Insurance Company*, ... 342

2. Such abandonment may occur after the vessel has commenced her specified voyage. *Id.*

3. The facts in the present case present a case of abandonment, and not one of an intention to deviate, and the policy was therefore at once defeated when the master of the ship abandoned the termini of the

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voyage described in the policy, and sailed from Falmouth, bound to Antwerp, as her port of discharge. *Id.*

V. *Agreement for, when enforced in Equity.*

Ante, I. 1.

INTESTATES.

I. *Succession to Estate, how affected by Domicil.*

See CONFLICT OF LAWS, III.

II. *Laws of Pennsylvania.*

See DESCENT AND DISTRIBUTION.

JUSTICE OF PEACE.

Liability for Acts when not duly qualified.

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the Constitution of the State. *Courser* vs. *Powers*, ... 268

2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown. *Id.*

3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify; the official oath is only commensurate with the appointment, and covers only the existing term of office. *Id.*

LAKE.

See RIPARIAN OWNERS.

LEASE.

Re-entry for Non-payment of Rent.

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject. *Bowman* vs. *Foot*, ... 352

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." *Held*,

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void.*

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.

3. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.] *Id.*

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quere.* The current of authorities is against such a doctrine. *Id.*

LEGAL TENDER NOTES.

See CONSTITUTIONAL LAW, II.

LEX LOCI.

See CONFLICT OF LAWS.

MARRIED WOMAN'S ACTS.

Liability of separate Estate, and how enforced.

1. The contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate by virtue of the enabling statutes (secs. 1, 2, and 3, R. S. Wis. 1858), are binding upon the estate at law. (*Conway* vs. *Smith*, 13 Wis.) *Todd* vs. *Lee*, ... 657

2. All her other engagements stand as before, good only in equity. (The case of *Yale* vs. *Dederer*, 22 N. Y. 450, considered and disapproved; s. c., 18 N. Y. 265, approved.) *Id.*

3. The change from an equitable to a legal estate, has not, with respect to her general engagements, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity without restriction as to the *jus disponendi*, capable of charging it with debts incurred for her own benefit or the benefit of her estate, to its full extent, and such charge may be enforced in a civil action under the Code of Procedure. *Id.*

4. The action should be *in rem* not *in personam*, for she is incapable of charging herself *personally* either in equity or at law. *Id.*

5. Injunctions and receivers in such actions may be had to preserve the property during the pendency of the suits, and to convert the property and satisfy the debts, for want of other process, after judgment. *Id.*

6. The husband is a proper party, but no personal demand can be made against him in such cases. At common law the personalty of the wife rests absolutely in the husband, and although he may be liable for her debts upon the principles of agency, yet, even under the Code of Procedure, to bind him or his property a separate action at law must be brought. This common law rule has no application in such cases in equity; and whether he is liable or not is a question of fact for the jury. *Id.*

7. L., a *feme covert*, the owner of a separate estate under the enabling statute, with her husband's permission, upon the faith and credit of her separate estate, purchased goods and hired a store, and engaged in trade as if she were *sole*. She failed to pay the rent, and refused to pay for the goods, because of coverture. In actions brought to charge the rent and price of the goods upon her separate estate, and to apply the goods left to liquidate the claims in suit, *Held*, That as it is an established rule in equity that a *feme covert* may, with her husband's permission, given even after marriage, become a *sole trader*, and hold the profits arising out of her business to her sole and separate use, so equity, in consideration of the benefit thus accruing to her separate property, will charge the debts properly incurred in trade upon it, and apply both her separate property and stock in trade to their payment, through a receiver. *Id.*

MISTAKE OF BOUNDARIES.

See TROVER.

MONEY HAD AND RECEIVED.

For Proceeds of Fraud.

See FRAUD.

MUNICIPAL SUBSCRIPTIONS.

Validity of.

By the provisions of a statute, the Supervisor and Commissioners of the town of S. were authorized to borrow a sum of money, not exceeding twenty-five thousand dollars, upon the credit of the town, and to execute

MUNICIPAL SUBSCRIPTIONS.

therefor, under their official signatures, a bond or bonds. They were to have no power to do any of the acts authorized by the statute until the written assent of two-thirds of the resident tax-payers was obtained and filed in the office of the County Clerk. The money, when obtained, was directed to be paid over to the president and directors of a railroad company then about to be organized for the construction of a railroad through the town. Instead of borrowing the money, the Supervisors and Commissioners executed and delivered the bonds directly to the railroad company in payment for stock for which they were authorized to subscribe, and these were subsequently sold by the company at a discount. Each of the bonds, upon which the plaintiff brought his action, stated that the requisite consent of the tax-payers had been obtained and properly filed, with a certificate of the County Clerk that a paper, purporting to be the written assent, &c., had been filed in his office. The statute did not authorize the giving of this certificate, nor did it prescribe in what method the written assent should be proved. No evidence was offered that the consent had been given other than what is above stated. The bonds on which the suit was brought were payable to bearer, and the plaintiff was a holder for value.

1. *Held*, that the power to borrow was not properly complied with.

2. That the provision requiring the assent of the tax-payers, as evidenced, was a condition precedent to the issue of the bonds, and an indispensable prerequisite to their validity.

3. That in the absence of all direct proof that the written assent had been obtained, the town was not estopped by the acts of its agents, who had issued bonds asserting upon their face that it had been, even though it had, for a considerable period, acquiesced in their acts. Such consent should have been proved affirmatively. The case does not come within the rule that when a power is conferred, if the agent does an act which is *apparently* within the terms of the power, the principal is bound by the representation of the agent as to the existence of any *extrinsic* facts essential to the proper exercise of the power where such facts, from their nature, rest *peculiarly* within the knowledge of the agent. The defect consists in the existence of the power itself, and if it did not, the facts requisite to the validity of the bonds being created by statute, were not peculiarly within the knowledge of the town.

4. The fact that the bonds were negotiable, and purchased for value without notice of the defect, does not, under such circumstances, aid the plaintiff. *Gould* vs. *The Town of Sterling*, ... 290

NEW JERSEY.

Jurisdiction over Waters of Hudson.

By the compact between the States of New Jersey and New York, approved by Congress in the year 1834, the State of New York has exclusive jurisdiction over all the waters of the Hudson River, and of and over the lands covered by the said waters, *to the low-water mark* on the New Jersey shore. On an indictment in New Jersey for obstructing the free navigation of the said river, by placing, sinking, and lodging in the said river certain ships, schooners, boats, and other vessels, the jury rendered a general verdict of guilty, but found as a fact that the defendants had, within the times specified in the indictment, placed and procured to be placed vessels and wrecks of vessels both above and *below* the low-water line, which were an interruption to the navigation. A new trial was granted. *The State* vs. *Babcock*, ... 752

Observations on the nature and ground of the compact between the States. *Id.*

NEW YORK.

Compact with New Jersey.

See NEW JERSEY.

OFFICE.

Liability of Officer for Acts, when not duly Qualified.

See JUSTICE OF THE PEACE.

PATENT.

Exclusive License to use Patent, where extends to Assignee for Creditors.

An assignment of the revenues of a railroad, by the company, to a preferred creditor, and the use of the rolling stock, is not a transfer of corporate entity or property. And the use, by the assignee, of cars which have attached patented brakes, does not render him liable to account for infringement upon the patent-right, when the exclusive use of the brakes had been licensed to the company by the patentee. The assignee used the brakes as an agent of the company, and not as a purchaser; and his use of them, in the name of the company, was exclusive in the meaning of the license. *Emigh* vs. *Chamberlain*, ... 207

PLEADING.

Foreign Judgment on same Cause of Action, when a Bar.

Declaration stated that the registered owner of a British ship mortgaged it, and on the 9th of April, 1855, the plaintiff became the mortgagee; that on the 8th June, 1854, the captain, while on a voyage, drew a bill at Melbourne, in Australia, on the owner in England, for necessary disbursements of the ship, in favor of L. & Co.; that L. & Co., without value, indorsed it to the defendants, British subjects residing in England; that the bill was dishonored; that the defendants, knowing the premises, and that the ship was about to call on her voyage at the port of Havre de Grace, in France, and that by the law of France the bona fide holder for value of such a bill (if a French subject), could take proceedings in the French courts and attach and sell the ship, conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was bona fide holder of the bill for value; and thereupon T., upon the arrival of the ship in a French port, took proceedings in the French courts, and therein obtained orders for the attachment and sale of the ship; and the plaintiff was deprived of his property in the ship: *Held*, that this being a judgment in rem, though in a foreign court, an action could not be maintained while it remained unreversed, as it was consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and allowed judgment to go by default, or even that he appeared in the French court, and the question whether T. was a holder of the bill for value was decided against him. *Castrique* vs. *Behrens and others*, ... 48

POWERS OF ATTORNEY.

In Blank.

See CORPORATIONS, II. 6.

RAILROAD.

See CORPORATIONS, II.

RE-ENTRY.

For Non-payment of Rent.

See LEASE.

RIPARIAN OWNERS.

Rights of on Inland Lakes.

The rule of riparian proprietorship upon the river Detroit, as laid down

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in Lorman *vs.* Benson, 8 Mich. 18, is applicable to Lake Muskegon; and the ownership of land bordering upon the lake, carries with it the ownership of the land under the water, so far out as it is susceptible of beneficial private use, but subordinate to the paramount public right of navigation, and the other public rights incident thereto. *Rice* vs. *Ruddiman*, . 615

SALE OF GOODS.

I. *Bill of Parcels.*

When the contract of sale is complete, its terms cannot be changed, by reference to a bill of parcels subsequently rendered by the vendor. *Allen* vs. *Schuchardt*, ... 13

II. *Implied Warranty of Soundness of Food.*

A butcher purchased a carcass of beef exposed for sale in Newgate market, of a meat salesman there, without any express warranty of its soundness. Upon the meat being cooked, it was discovered to be unfit for human food, and returned. The defect did not appear when it was raw, and there was no evidence that defendant knew, or had any reason to suspect, that the beef was otherwise than good and wholesome meat, fit for human food:

Held, that there was no implied warranty in such case, and as there was no proof of any express warranty, the plaintiff could not recover; that no action for deceit would lie, as there did not appear, on the part of the defendant, to be fraud. *Emerton* vs. *Mathews*, . . . 231

III. *Sales by Sample.*

S. acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages.

Held—1. The oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

2. The action on the case is a proper remedy, and it is not necessary to aver a *scienter*.

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S. not having disclosed his principals, is personally liable. *Allen et al.* vs. *Schuchardt et al.*, ... 1.

IV. *Warranty implied from Custom.*

See CONTRACT, I. 6.

SCHUYLER FRAUDS.

See CORPORATIONS,

SHERIFF.

Action against, for Escape.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant. *Whithead* v. *Keyes*, ... 471

And see ARREST, I.

SLANDER.

What Evidence in Mitigation.

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant, in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious. *Bridgeman* vs. *Hopkins*, ... 168

STATUTE OF FRAUDS.

See CONFLICT OF LAWS, I.

STEAMBOAT.

Inspection Laws of United States.

1. A vessel propelled in whole or in part by steam, is not liable to a penalty for transporting goods, wares and merchandise, without inspection of the hull and boilers, under the act of Congress of August 30, 1852. The penalty is alone for transporting passengers. *United States* vs. *The Propeller "Sun,"* 227

2. *Quere.*—Can a vessel belonging at the port of Buffalo, where inspectors are located by the act of August 30, 1852, be inspected at the port of Chicago? *Id.*

3. An answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts. *Id.*

4. A steamboat employed in transporting passengers between ports in the same State, is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction. *United States* vs. *Steamboat "Seneca,"* 281

TAX LAWS.

United States Loans, when subject to State Taxation.

See CONSTITUTIONAL LAW, III.

TROVER.

For Coal dug by mistake of Boundaries.

1. Trover will lie to recover the value of coal dug by the owner of land, through a mistake of boundaries, out of adjoining land. *Forsyth* vs. *Wells*, ... 225

2. The measure of damages in such action, there being no wrongful purpose, will be the fair value of the coal in place, as if on a purchase of the coal field from the plaintiff, and not its value when mined. *Id.*

UNITED STATES.

Loans of, when subject to Taxation.

See CONSTITUTIONAL LAW, III.

WARRANTY.

See SALE OF GOODS, II., III., IV.

WAY.

Right of, by Necessity.

A right of way cannot arise from *mere necessity*, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership. *Tracy* vs. *Atherton et al.* 739

WILL.

I. *Undue Influence in procuring, when presumed.*

1. In an issue to try the validity of a will, which was contested on the ground of undue influence, want of mental capacity, coercion, and on other grounds, it appeared that, by the alleged will, the testator gave a trifling sum to his only legitimate child, and then bequeathed the residue of his property to the children of a woman with whom he was alleged to have been living in adulterous intercourse. There was no direct evidence given or offered of want of mental capacity at the time, or of any actual coercion or influence exerted in the testator as respects the testamentary act; but it was proposed to prove the fact of this adulterous intercourse, which was of long continuance, and which had obliged his wife and daughter to abandon his house, and that the alleged adulteress was a woman of vigorous character, and exerted a despotic influence over his actions generally, in connection with the fact that he was suffering from a painful disease, to relieve which he took opiates, as tending to show undue influence generally. *Held*, that the evidence was admissible for this purpose, on the ground that the relation being an unlawful one, the influence which sprang from it must also be unlawful. *Dean* vs. *Negley*, 283

2. *Semble*, by LOWRIE, C. J., that this would be a presumption of law. *Id.*

II. *Effect of change of Domicil upon.*

See CONFLICT OF LAWS, II.

WITNESS.

When compellable to testify.

The Constitution (Art. 1, § 6,) does not protect a witness in a criminal prosecution against another, from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial. *The People* vs. *Kelly*, ... 534

That the information thus elicited facilitates the discovery of other evidence by which the witness may be subsequently convicted, is an incidental consequence against which the Constitution does not guard him. Its prohibition is simply against his being required to give evidence where he himself is upon trial. *Id.*

The refusal of a witness to answer a proper question before a grand jury, is punishable as a contempt under the statute (2 R. S., p. 534, § 1, p. 735, § 14) as committed in a proceeding upon an indictment. *Id.*

When the refusal was reported by the grand jury to the court in the presence of the witness, who did not deny but justified the same, and reiterated the refusal, the contempt is one "in the immediate view and presence of the court," and no affidavit or further evidence is requisite to a commitment. *Id.*

The appellate court, before which the propriety of a commitment for contempt is brought by *certiorari*, or even collaterally on *habeas corpus*, is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right. *Id.*

The adjudication of the court in which the alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do. *Id.*